United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2198

B
Pgs 5
4cc

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2198

AMERICO MICHEL,

Petitioner-Appellant

-v.-

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR APPELLANT

MICHAEL J. CHURGIN
Attorney for Petitioner-Appellant
127 Wall Street
New Haven, Connecticut 06520

On brief:

Anna Durbin
Yale Law School
Class of 1976

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: page

Statutes & Rules:

page

Regulations:

Miscellaneous:

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2198

AMERICO MICHEL,

Petitioner-Appellant

-v.-

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

Petitioner-Appellant Americo Michel appeals from a denial, without a hearing, of his motion to vacate his sentence pursuant to 28 U.S.C. §2255.

In the underlying criminal proceeding, 72 CR 278, the petitioner pled guilty on February 20, 1973 to aiding and abetting the distribution of a controlled substance - cocaine - in violation of 18 U.S.C. §2 and 21 U.S.C. §841 (a)(1). Count two of the two count indictment was dismissed. On June 1, 1973, the Honorable Jacob Mishler, Chief Judge of the Eastern District of New York, sentenced petitioner to five years imprisonment to be followed by a special parole term of five years.

In the collateral proceeding from which he appeals, 74 C 627, petitioner sought to vacate his sentence and withdraw his guilty plea pursuant to 28 U.S.C. §2255. On April 23, 1974, a verified motion was filed accompanied by an affidavit of petitioner's trial attorney and a memorandum of law. Petitioner's guilty plea was not voluntary and must be vacated in light of the requirements of Rule 11, F.R.Crim.P., because he did not understand the consequences of his plea: (1) Petitioner did not understand the meaning of the "special parole" term attached to his sentence, and it was not explained to him by counsel or by the Court; (2) Petitioner was not informed by the Court nor by counsel that as an alien narcotics offender he would be automatically ordered deported pursuant to 8 U.S.C. §1251 (a)(11) and (b).

The District Court in an unreported opinion denied the motion without conducting an evidentiary hearing, holding (1) that a special parole term is a direct consequence of a guilty plea, but that petitioner understood its meaning; and (2) that petitioner need not be informed of deportation because it is a collateral, rather than direct consequence of a guilty plea. Judgment was entered on July 29, 1974, and a notice of appeal was filed the same day. A deportation hearing having been scheduled in petitioner's case, petitioner moved for an expedited appeal which was granted.

ISSUES PRESENTED

1. Once having held that special parole is a consequence of the guilty plea, did the court err in finding that petitioner understood the meaning of special parole without holding an evidentiary hearing?

2. Did the District Court err in holding that deportation of an alien convicted of a narcotics offense is not a consequence of the plea?

ARGUMENT

I

AFTER PROPERLY HOLDING THAT SPECIAL PAROLE IS A CONSEQUENCE OF A GUILTY PLEA, THE DISTRICT COURT ERRED IN FINDING THAT PETITIONER UNDERSTOOD THE MEANING OF SPECIAL PAROLE WITHOUT FIRST CONDUCTING AN EVIDENTIARY HEARING.

A. The District Court Properly Held that Special Parole Is a Consequence of the Guilty Plea, which the Defendant Must Understand in order for the Guilty Plea to be Valid.

Petitioner was sentenced to 5 years incarceration after pleading guilty to aiding and abetting the distribution of cocaine, a Schedule II Controlled Substance; 21 U.S.C. §841(a), 18 U.S.C. §2. Pursuant to 21 U.S.C. §841(b)(1)(A) the sentence also included "a special parole term of at least three years." The five year special parole term imposed doubles petitioner's time of exposure to incarceration and prolongs the time during which he must live subject to the considerable supervisory restraints of the United States Board of Parole.

It is axiomatic that a defendant must understand the consequences of a guilty plea in order for the plea to be valid. See, e.g., McCarthy v. United States, 394 U.S. 459 (1969); United States ex rel. Leeson v. Damon, 496 F.2d 718, 721 (2d Cir. 1974). Ineligibility for parole is a consequence of a guilty plea which the defendant must understand in order for the plea to be valid. Bye v. United States, 435 F.2d 177 (2d Cir. 1970); see Moody v. United States, 469 F.2d 705 (8th Cir. 1972); Berry v. United States, 412 F.2d 189 (3d Cir. 1969); Durant v. United States, 410 F.2d 689 (1st Cir. 1969). The rationale for Bye, Berry, Moody and Durant was that

regular parole is assumed available by the average defendant. The essence of parole is a conditional release from prison before completion of the sentence. 18 U.S.C. §4203; Morrissey v. Brewer, 408 U.S. 471 (1972); United States ex rel. Johnson v. Chairman, New York Board of Parole, ___ F.2d ___, slip op. 4127 (2d Cir., June 13, 1974). Therefore, ineligibility for parole in effect added time to sentences of imprisonment. Special parole is analogous in its effect on the range of the sentence to ineligibility for parole.

Special parole is a novel provision of the Comprehensive Drug Abuse Prevention and Control Act (21 U.S.C. §841, effective May 1, 1971). This provision replaced and repealed the former 26 U.S.C. §7237(d), that part of the Internal Revenue Code which made convicted narcotics offenders ineligible for parole. The Bureau of Prisons describes the special parole term as "a new concept." Bureau of Prisons, Policy Statement 7500.43 (January 18, 1973). See Appendix, at 57. The statute provides:

> The special parole term is separate from and begins after the regular sentence has been served, including any other parole. In case of a violation of the conditions of the special parole term, the original term of imprisonment will be increased by the entire period of the term, without regard to the length of time spent on special parole.

21 U.S.C. §841(c). The special parole term "imposes restrictions upon freedom in excess of the full term of sentence and the possibility of additional imprisonment for special parole term violators." Roberts v. United States, 491 F.2d 1236, 1238 (3d Cir. 1974).

Both the Third and Eighth Circuits have held that special parole is a consequence of the guilty plea covered by the terms of Rule 11. No Circuit holds to the contrary. Special parole enlarges a sentence in the same manner as ineligibility for parole; it differs radically from the generally understood concept of parole. Roberts v. United States, supra; United States v. Richardson, 483 F.2d 516 (8th Cir. 1973); United States v. Valenciano, 495 F.2d 585, 588 (3rd Cir. 1974)(Rosenn, J., concurring) Petitioner, never before charged with a crime, had no occasion to know the meaning of this novel concept. The Court below was correct in holding that special parole is a consequence of the guilty plea which a defendant must understand in order for a plea of guilty to be valid.

B. The District Court Erred in Finding that the Petitioner Understood the Meaning of the Special Parole Term without Holding an Evidentiary Hearing.

The District Court, without holding an evidentiary hearing, denied petitioner's motion to vacate sentence contrary to the dictates of 28 U.S.C. §2255 and the prior decisions of this Court. In pertinent part, 28 U.S.C. §2255 provides:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the United States Attorney, grant a prompt hearing thereon; determine the issue and make findings of fact and conclusions of law with respect thereto.[1/]

1/ Petitioner's motion was filed on April 23, 1974. Subsequent telephone calls two months later revealed that the Government had submitted memoranda in opposition, but that no copies had been sent to petitioner's counsel nor had the memoranda been filed in the clerk's office. The Government's memoranda were finally received after additional requests were made. Counsel for petitioner promptly contacted the chambers of the District Judge to request permission to submit a reply brief, but was informed that the opinion already had been prepared.

The District Court made no explicit finding, nor could it make such finding without holding a hearing, that the petitioner was "conclusively ... entitled to no relief" under the facts of this case. Petitioner's motion was verified and supported by a sufficient affidavit of his counsel of record in the trial court. The question of petitioner's understanding of the meaning of special parole was properly set forth. Only recently, the Court of Appeals has emphasized that it "takes a dim view of any summary rejection of a petition for post conviction relief when supported by a sufficient affidavit." Dalli v. United States, 491 F.2d 758, 760 (2d Cir. 1974); see Taylor v. United States, 487 F.2d 307 (2d Cir. 1973).

"The Rule 11 record is evidential on the issue of voluntariness ... not conclusive." United States ex rel. McGrath v. LaVallee, 319 F.2d 308, 314 (2d Cir. 1963); Trotter v. United States, 359 F.2d 419 (2d Cir. 1966). Though the District Court noted that it had inquired as to whether the defendant understood the consequence of the special parole term as required by Rule 11, F.R.Crim.P., this does not make collateral attack per se unavailable.

> Like any procedural mechanism, its exercise is neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations.

Fontaine v. United States, 411 U.S. 213, 214 (1973). The verified motion and the supporting affidavit of petitioner's trial counsel present a prima facie case requiring the holding of an evidentiary hearing.

In United States v. Richardson, supra, the defendant, like petitioner, was informed of the special parole term. However, the Court of Appeals held that as a result of the complexity of the provisions of special parole[2/] and its difference from ordinary parole, "additional care should have been taken to make sure that the defendant understood this facet of the consequences of his guilty plea." 483 F.2d at 520 (emphasis supplied). Contrary to the suggestion of the District Court below, the reason for reversal in Richardson was not that the Assistant United States Attorney instead of the Court advised the defendant of the special parole term, but that petitioner did not understand the meaning of special parole.

In the instant case, petitioner was in an unfamiliar situation at the taking of the plea. He had never before been a defendant in a criminal proceeding and had been out on bail following arraignment. His counsel had not told him he could possibly be sentenced to 15 years imprisonment. (Appendix at 32) Petitioner was given a few moments to consider the regular sentence possibility and then was informed of a "special parole term."[3/]

2/ See the extended description of the special parole term contained in Bureau of Prisons Policy Statement 7500.43 (Appendix at 57), cited in Roberts v. United States, 491 F.2d 1236, 1238 (3d Cir. 1974).

3/ Below is the relevant excerpt from the transcript of the plea in United States v. Michel, 72 CR 278, February 20, 1973, pages 19-22. See Appendix at 14ff for the complete transcript of the plea and sentencing.

* * *

THE COURT: Do you know that the maximum sentence which may be imposed, Mr. Michel, is a prison term of 15 years and a fine of $25,000, do you know that?

In his verified motion petitioner has stated under oath that he did not understand the meaning of special parole. His trial attorney has

3/ (continued)

THE DEFENDANT MICHEL: No.
THE COURT: Didn't Mr. Singer tell you that? You know that there was a sentence, a statutory sentence that could be imposed, didn't you?
* MR. SINGER: Do you know you can be sentenced to jail for this charge?
He didn't know the 15-year limitation.
THE COURT: I think that is most important. I will give you an opportunity to think it over before I pass on the plea.
Do you want more time to think it over?
THE DEFENDANT MICHEL: I have to discuss it with my lawyer.
THE COURT: Mr. Singer, did you --
MR. SINGER: We spoke of the possibility of jail.
THE COURT: You didn't tell him the term? The maximum sentence which may be imposed is a prison term of 15 years and a fine of $25,000.
Do you know that that is the maximum sentence that may be imposed, Mr. Mininni?
THE DEFENDANT MININNI: Yes.
THE COURT: A prison term of 15 years and a fine of $25,000.
Mr. River, do you know the maximum sentence may be a prison term of 15 years and a fine of $25,000?
THE DEFENDANT RIVER: Yes.
THE COURT: You do know that?
** MR. DePETRIS: In addition to the special parole.
THE COURT: In addition, the Court must impose a minimum special parole term not less than three years.
Do you understand that?
THE DEFENDANT MICHEL: Yes.
THE COURT: Mr. Mininni?
THE DEFENDANT MININNI: Yes.
THE COURT: Mr. River?
THE DEFENDANT RIVER: Yes.
THE COURT: Mrs. Marcano, do you know that the maximum prison term which may be imposed is a prison term of one year and a fine of $5,000? Do you know that?
THE DEFENDANT MARCANO: Yes.

* Trial Attorney for Petitioner
** Assistant United States Attorney

indicated that he never discussed the matter of special parole; Affidavit of Irving Singer, Esq., Appendix at 56. The minutes of the plea and sentencing confirm petitioner's confusion. Petitioner did not understand the special parole term; cf. United States ex rel. Leeson v. Damon, 496 F.2d 718 (2d Cir. 1974).

The record and the files do not "conclusively show that under no circumstances could the petitioner establish facts warranting relief under §2255," Fontaine, supra, 411 U.S. at 215. The judgment below should be vacated, and petitioner be allowed to plead anew, see United States v. Richardson, supra, 483 F.2d at 520. In the alternative, the judgment below should be vacated and the case remanded for an evidentiary hearing.

3/ (continued)

> THE COURT: Mr. Michel, have you thought it over since you are the only one that said you didn't know what the maximum term is?
> THE DEFENDANT MICHEL: Now I understand.
> THE COURT: Will it in any way affect your offer to plead guilty?
> THE DEFENDANT MICHEL: I plead guilty.
> THE COURT: You mean it will not affect your offer to plea? You still want the Court to accept your plea of guilty?
> THE DEFENDANT MICHEL: Yes, sir.
> THE COURT: Having been advised of your constitutional rights, the nature of the charge against you, and the consequence of your plea, Americo Michel, how do you plead to Count Two of the indictment?
> THE DEFENDANT MICHEL: I didn't hear.
> MR. SINGER: Do you plead guilty or not guilty?
> THE DEFENDANT MICHEL: I plead guilty.

II

THE DISTRICT COURT ERRED IN HOLDING THAT AN ORDER OF DEPORTATION OF AN ALIEN CONVICTED OF A NARCOTICS OFFENSE IS NOT A CONSEQUENCE OF THE GUILTY PLEA ABOUT WHICH THE COURT MUST INFORM A DEFENDANT BEFORE ACCEPTING A GUILTY PLEA AS VOLUNTARY.

It is settled law that a defendant who pleads guilty to a charge must do so "with full understanding of the consequences." United States ex rel. Leeson v. Damon, 496 F.2d 718 (2d Cir. 1974). See McMann v. Richardson, 397 U.S. 759, 766 (1970); McCarthy v. United States, 394 U.S. 459, 466 (1969); Kercheval v. United States, 274 U.S. 220, 223 (1927). Rule 11 of the Federal Rules of Criminal Procedure requires that a federal court not accept a guilty plea without questioning a defendant personally to determine his "understanding of the consequences of [his] plea."

> The purpose of Rule 11 was to insure that an accused is apprised of the significant effects of his plea so that his decision to plead guilty and waive his right to a trial is an informed one.

Bye v. United States, 435 F.2d 177, 180 (2d Cir. 1970).

When as a direct result of a plea of guilty, a defendant will face a deportation order, Rule 11 requires that the court inform the defendant of this consequence prior to the acceptance of the plea. The Supreme Court has described deportation as a

> drastic measure and at times the equivalent of banishment or exile....It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty.

Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948). Had petitioner known that he would be ordered deported as a result of his plea, he would not

have pled guilty but would have chosen to stand trial.[4/]

Petitioner pled guilty to a violation of the Comprehensive Drug Abuse Prevention and Control Act -- aiding and abetting the distribution of cocaine, 18 U.S.C. §2 and 21 U.S.C. §841(a)(1). Since petitioner is a permanent resident alien, he will be ordered deported directly as a result of his plea. 8 U.S.C. §1251 (a)(11). As Chief Judge Bazelon of the District of Columbia Circuit has observed, "It is undisputed [that] a narcotics conviction would lead to automatic deportation." United States v. Sambro, 454 F.2d 918, 924 (1971)(dissenting from denial of rehearing en banc). As an alien convicted of a narcotics offense, petitioner is ineligible for relief from deportation by either a pardon or a recommendation against deportation by the sentencing judge. 8 U.S.C. §1251(b). It is the policy and practice of the Immigration and Naturalization Service to order deported all aliens convicted of narcotics offenses.

The court below erroneously concluded that the deportation of an alien narcotics offender does not follow automatically from conviction, Appendix at 7, because (1) there is a separate administrative hearing to determine deportatibility and (2) there is provision in the law for suspension of deportation. The only issue at the deportation hearing, now twice

---

[4/] Petitioner is 44 years old and has lived in this country for 25 years. His wife of 19 years is an American citizen and they have six surviving children, all American citizens. The two eldest sons are serving in the Marines and the Air Force while four children remain at home. The execution of an order of deportation would force a family of American citizens to choose between leaving the only country which that family knows or remaining in the United States without the head of the family. Petitioner would never voluntarily place his family in such a position.

postponed in petitioner's case as a result of the instant action, is whether a narcotics conviction took place; once the conviction is shown, the alien is ordered deported. 8 U.S.C. §1251(a)(11). The mere fact that the Immigration and Nationality Act provides for a hearing prior to the issuance of an order of deportation, 8 U.S.C. §1252(b), does not make the issuance of the deportation order in narcotics cases any less automatic.

Suspension of the already ordered deportation pursuant to 8 U.S.C. 1254(a)(2) is of slight applicability in narcotics cases. See Wexler & Neet, "The Alien Criminal Defendant: An Examination of Immigration Law Principles for Criminal Law Practice," 10 Criminal Law Bulletin 289, 316 (1974). To qualify for suspension, the alien must remain in this country for ten years following the commission of the deportable offense, establish that he is of "good moral character," receive the recommendation of the Attorney General and obtain a concurrent resolution from Congress approving the recommendation. 8 U.S.C. §1254(c)(3).[5/] The conclusions of

5/ The court below also cited a heretofore unpublished Operation Instruction of the Immigration and Naturalization Service to buttress the contention that an order of deportation is not automatic in narcotics cases, Appendix at 8. Service Operation Instruction 103.1(a)(1)(ii) authorizes the Service district director to recommend consideration for "nonpriority status" where deportation "would be unconscionable because of the existence of appealing humanitarian factors." Counsel for petitioner was able to obtain from the Service Regional Commissioner the Operation Instruction which the court referred to, following refusal of the Hartford District Director to provide a copy. Appendix at 62. The opinion of the court below indicates that the non-priority recommendation of the district director must also be reviewed by the regional commissioner and a review board. Appendix at 8. From recent conversations with Service personnel, counsel has learned that the Operation Instruction is rarely applied, and almost never utilized in narcotics cases; in addition, it is the practice of the Service to issue an order of deportation prior to consideration of non-priority status.

the District Court in this respect do not conform to the statutory scheme set forth in the Immigration and Nationality Act to deport aliens convicted of narcotics offenses. To develop facts concerning the administrative interpretation and application of the Immigration and Nationality Act an evidentiary hearing would have been appropriate.[6/]

Whether Rule 11 requires the District Court to inform an alien defendant that a guilty plea to a narcotics charge will result in an order of deportation is undecided in this Circuit. In United States v. Santelises, 476 F.2d 787, 790 (2d Cir. 1973), Chief Judge Kaufman concluded his opinion with the following statement:

> We emphasize, finally, that cases arising after the enactment of the 1966 amendments to Rule 11, F.R.Crim.P., may bring different considerations to bear upon this problem but we neither address nor decide those questions.

The version of Rule 11 in force when petitioner pled required that a defendant understand "the consequences of the plea" prior to its acceptance by the court. In Santelises, the question of deportation was considered in light of the prior Rule 11 which had no "understanding of the consequence" mandate. Similarly, the one other discussion of deportation in this Circuit was in United States v. Parrino, 212 F.2d 919 (2d Cir.), cert. denied, 348 U.S. 840 (1954), where the defendant based his motion to withdraw his plea of guilty on constitutional grounds and also sought to

---

6/ See, e.g., Grasso v. Norton, 376 F. Supp. 116 (D.Conn. 1974), appeal docketed on other grounds, No. 74-1222 (regarding parole administration by the Board of Parole, testimony taken of its Director of Research).

show the necessary "manifest injustice" to come within the stricture of Rule 32(d), F.R.Crim.P.

In Parrino, this Court developed a doctrine of collateral and direct consequences; a district judge would only have to insure that a defendant understood the "direct" consequences of the plea. 212 F.2d at 921-922. Deportation was there classified as a collateral consequence; however, where an alien pleads guilty to a narcotics charge, the order of deportation is direct and largely automatic. See discussion supra. The Fourth Circuit articulated the difference between direct and collateral consequences in Cuthrell v. Director, Patuxent Institute, 476 F.2d 1364, 1366 (1973)(while following this circuit's conclusion in Parrino):

> The distinction between 'direct' and 'collateral' consequences of a plea ... turns on whether the result represents a definite, immediate, and largely automatic effect on the range of a defendant's punishment.

The order of deportation in petitioner's case is "definite, immediate, and largely automatic." It is a direct consequence of the guilty plea about which an alien defendant must be informed in order for the plea to a narcotics violation to be in conformity with Rule 11. The dissenting opinion of Judge Frank in Parrino states the more appropriate view. 212 F.2d at 922, 924. Judge Leventhal speaking for the District of Columbia Circuit in United States v. Briscoe, 432 F.2d 1351, 1353 (1970), noted that:

> Under appropriate circumstances the fact that a defendant has been misled as to the consequence of deportability may render his guilty plea subject to attack. Insofar as a contrary view may be inferred from United States v. Parrino [citation omitted] on the ground that deportability is only a 'collateral consequence' of conviction, we agree with Professor Moore, see 8A, J. Moore, Federal Practice, [Paragraph 32.07 [3b] at 32-105 (Cipes ed. 1973)]: 'The vigorous dissent of Judge Frank more likely reflects the present attitude of the federal judiciary.'

See Vizcarra-Delgadillo v. United States, 395 F.2d 70, 72 (9th Cir. 1968) (Browning, J., dissenting). See also A. Goldstein & L. Orland, Criminal Procedure 147 (Little, Brown 1974); United States v. Sambro, supra, 454 F.2d at 956, (Bazelon, C.J., dissenting from denial of rehearing en banc).

The case of petitioner presents the "appropriate circumstances." Of all the consequences directly flowing from his guilty plea, the order of deportation is probably the most significant to petitioner, since it will mean leaving the only country he has known for 25 years and causing the break-up or dislocation of his family. The order of deportation is a direct and significant consequence of the plea of guilty. To comply with Rule 11, the District Court must insure that an alien defendant about to plead guilty to a narcotics offense understands that one consequence of the plea will be an order of deportation. 7/

7/ The alien is an easily identifiable defendant. If the district judge did not know of the defendant's alien status at the time of the guilty plea, the court would know prior to sentencing based on the presentence report. In this sense, alienage is analogous to age. A defendant eligible for a Youth Corrections Act sentence which could be longer than a regular adult sentence must be informed of this possibility in order for the plea to be valid. See United States ex rel. Leeson v. Damon, supra, 496 F.2d at 722. The defendant not realizing the adverse significance of his age at the time of the plea, sought to withdraw his plea upon learning of the possibility of a reformatory sentence. This Court held that the due process clause required New York to permit Leeson to plead anew. Any lack of knowledge or

For all of the foregoing, the judgment below should be vacated and the defendant allowed to plead anew. In the alternative, if the question of deportability as a consequence turns on its "automatic" nature for alien defendants with narcotic convictions, the judgment should be vacated and remanded for an appropriate evidentiary hearing.

7/ (continued)
error as to age would be corrected based on the presentence report prior to sentencing to have a valid guilty plea.

CONCLUSION

(1) The petitioner in his verified motion to vacate sentence stated he did not understand the meaning of special parole when he pled guilty. Petitioner's trial attorney in an accompanying affidavit stated that he never discussed special parole with petitioner. After properly holding that special parole is a consequence of the guilty plea which the defendant must understand in order for the plea to be a valid one under Rule 11, F.R.Crim.P., the District Court erred in finding that the petitioner understood the meaning of special parole without holding an evidentiary hearing. The judgment below should be vacated and petitioner be allowed to plead anew; or on remand, an evidentiary hearing should be held.

(2) It is uncontroverted that petitioner did not know that as an alien, he would be ordered deported based on a narcotics conviction following a plea of guilty. The District Court erred in holding that the order of deportation is not a consequence of petitioner's guilty plea about which the court must inform a defendant before accepting the plea. The judgment of the District Court should be vacated and petitioner be allowed to plead anew; or to develop a proper record on deportation practice, an evidentiary hearing should be held.

Respectfully submitted,

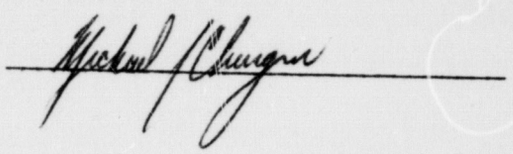
Michael J. Churgin
Attorney for Petitioner-Appellant
127 Wall Street
New Haven, Connecticut 06520
(203) 436-2210

On the brief:

Anna Durbin
Yale Law School
Class of 1976

CERTIFICATION

A copy of plaintiff's brief has been served, by hand, on David G. Trager, Esq., United States Attorney for the Eastern District of New York, Attorney for Respondent-Appellee, this 15th day of October 1974.



APPENDIX

APPENDIX

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

74 C 627

UNITED STATES OF AMERICA

-against-

AMERICO MICHEL,

Defendant.

Memorandum of Decision and Order

July 25, 1974

This is a motion to vacate sentence pursuant to 28 U.S.C. § 2255. On February 20, 1973, petitioner pled guilty to Count 2 of indictment number 72 CR 278, charging petitioner with a violation of 18 U.S.C. § 2 and of 21 U.S.C. § 84(b)(1)(A). Michel was sentenced by this court on June 1, 1973 to five years with a special parole term of five years. Petitioner now seeks to withdraw his plea of guilty, contending that his plea was not voluntary according to the requirement of Rule 11 F.R. Crim.P. because he did not understand the consequences of the plea. More specifically, he argues that:(1) he did not realize that as an alien and narcotics offender he would be deported pursuant to 8 U.S.C. §§ 1251(a)(1) and 1251(b) after having served his sentence; and (2) that he did not understand the meaning

of the special parole term which was part of his sentence as required by 21 U.S.C. § 841(b)(1)(A). For the reasons stated below, petitioner's motion is denied.

I. DEPORTATION

Petitioner contends that deportation is a direct result of the guilty plea and therefore is a consequence to which he must be informed in order to satisfy the requirement of voluntariness of Rule 11.

> Deportation, like ineligibility for parole, is a consequence of the guilty plea, imposed not by the sentencing judge, but required by a statute in a title of the United States Code other than that under which defendant pled or was sentenced. Deportation, like ineligibility for parole is a direct result of the guilty plea./1

Although the accused must be made fully aware of the direct consequences of a guilty plea, Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463 (1970), he need not be informed about the collateral effects. Bye v. United States, 435 F.2d 177, 179 (2 Cir. 1970)./2 In United States v.

/1 Petitioner's Memorandum of Law, at 2.

/2 "We consider the requirements of Rule 11 are met when the trial court is satisfied after interrogation of the defendant personally that he understands the direct 'consequences of the plea.' The trial court [need not inform the defendant of]...possible ancillary or inconsequential results which are peculiar to the individual and which may flow from a conviction of a plea of guilty." United States v. Sambro, 454 F.2d 918, 920 (D.C. Cir. 1971); see also Cuthrell v. Director, Patuxent Institute, 475 F.2d 1364, 1365-66 (4 Cir. 1973).

Parrino, 212 F.2d 919 (2 Cir.), cert. denied, 348 U.S. 840, 75 S.Ct. 46 (1954), the Second Circuit was faced with a motion to withdraw a plea of guilty to a charge of conspiracy to kidnap. Defendant there claimed that he had pled guilty only in reliance of the erroneous assurance of counsel that the plea would not result in deportation. The court affirmed the district court's denial of the motion, stating that this misrepresentation by counsel did not constitute 'manifest injustice' within the purview of Rule 32(d) and furthermore, that deportation was a collateral consequence of conviction.

> Moreover, here the subject-matter of the claimed surprise was not the severity of the sentence directly flowing from the judgment but a collateral consequence thereof, namely, deportability. This is a liability which may, and in this case does, depend on a conviction of crime. But it is nonetheless a collateral consequence of conviction. It is true that many statements in judicial opinions and by text-writers may be found—and the appellant here cites several such—to the general effect that a defendant should not be holden to a plea of guilty made without an understanding of the consequences. But neither the generalities found in the texts nor the facts underlying such judicial opinions suggest that the authors of such statements meant to imply that the finality of a conviction on a plea of guilty depended upon a contemporaneous realization by the defendant of the collateral consequences thereof. Certainly, the appellant fails to cite a single case so holding. And research of our own fails to disclose a case even intimating a rule of such breadth.

212 F.2d at 921-22.[3]

Similarly, the D. C. Circuit, in United States v. Sambro, 454 F.2d 918 (D.C. Cir. 1971), denied a motion to withdraw a plea of guilty where the defendant, an alien, had been incorrectly told by counsel that upon his guilty plea to a narcotics charge the judge could suspend sentence and defendant could thereby avoid being deported. As in Parrino, supra, the court here treated deportation as an ancillary consequence of the plea.[4]

Petitioner contends, however, that Parrino is no longer applicable and relies upon United States v. Santelises, 475 F.2d 787 (2 Cir. 1973). In Santelises the court held that the failure of a district judge to warn a defendant of the possibility of deportation as a consequence of his guilty plea did not constitute a violation of due process. However, the defendant had pled prior to the 1966 amendment to Rule 11, and the court in Santelises declined to decide whether the facts here would render the plea invalid under the amended Rule 11.

---

[3] But see Judge Frank's dissenting opinion.

[4] See also Cuthrell v. Director, Patuxent Institute, supra, at 1366, and cases cited therein.

> We emphasize, finally, that cases arising after the enactment of the 1966 amendments to Rule 11, F.R.Crim.P., may bring different considerations to bear upon this problem but we neither address nor decide those questions.

475 F.2d at 790. Petitioner interprets this statement of the court as making inapplicable the line of cases starting with Parrino. The Government, on the other hand, contends that it is improper to read such an interpretation into the above reservation and further argues that the rule in Parrino and subsequent cases has never been renounced in any circuit.

The only discussion of this issue by the Second Circuit is found in dicta in Bye v. United States, supra, where the court stated:

> It is true that an accused need not be informed prior to the acceptance of his guilty plea about every conceivable collateral effect the conviction entered on the plea might have. See e.g., ... United States v. Parrino, 212 F.2d 919 (2 Cir.), cert. denied, 348 U.S. 840, 75 S.Ct. 46, 99 L.Ed. 663 (1954) (conviction might subject an alien to deportation).

435 F.2d at 179-180. "The distinction between 'direct' and 'collateral' consequences of a plea ... turns on whether the result represents a definite, immediate and largely automatic effect on the range of defendant's punishment." Cuthrell v. Director, Patuxent Institute, 475 F.2d 1364,

1366 (4 Cir. 1973).

Petitioner cites Judge Bazelon's dissenting opinion in Sambro, supra, for the proposition that deportation is an automatic (and therefore direct) consequence of a narcotics offense conviction. However, Judge Bazelon did not state that deportation was an automatic and direct consequence of the plea[15] but merely that the sentencing judge, under 8 U.S.C. § 1251(a)(11), had no discretion to avoid defendant's deportation by submitting a recommendation. 454 F.2d at 925 and 92 n.7.[16]

Petitioner also relies on the comment in Moore's Federal Practice which states that "the vigorous dissent of Judge Frank [in Parrino] more likely reflects the present attitude of the federal judiciary." 8A J. Moore, Federal Practice, ¶ 32.07 [3][b] at 106. This comment does not,

---

[15] "[C]ourts have distinguished 'collateral' from 'direct' consequences for the purposes of Rule 11, and it might possibly be appropriate to treat deportation as a 'collateral' consequence, which need not be made clear to the defendant before he enters a valid plea." 454 F.2d at 925.

[16] In fact, the critical issue as Judge Bazelon perceived it was that Sambro involved a pre-sentence motion, and that as such, a Rule 32 motion need not allege a failure of the court to comply with the procedures required by Rule 11. 454 F.2d at 925-27.

however, indicate any change on the part of the Second Circuit from the position taken in Parrino. Moreover, a thorough reading of that section indicates that Professor Moore was referring to the performance of defense counsel in relation to defendant's understanding of the nature of the charges rather than deportation being a direct consequence of the plea.[7]

Indeed, deportation is not an automatic consequence of the plea. 8 U.S.C. § 1251(a)(11) provides that an alien is deportable upon conviction for a narcotics offense, not that he will automatically be deported as a result of his conviction. 8 U.S.C. § 1252(b) sets down an independent procedure subsequent to defendant's conviction for making a determination of deportability.[8] Furthermore, contrary to

---

[7] See 8A J. Moore, Federal Practice, ¶ 32.07[3][b] at 105-107 and especially note 46.1. See also Santelises, supra, where the court stated: "Although Professor Moore indicates his approval of Judge Frank's opinion, it is clear that Santelises does not allege that he was affirmatively misled by counsel, and he has not made out any claim of ineffective assistance of counsel." (citations omitted). 476 F.2d at 790.

[8] 8 U.S.C. §1252(b) states in part:

> A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien . . . . Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer . . . .

petitioner's contention, not all aliens convicted of narcotics offenses would be deported. 8 U.S.C. § 1254(a) provides that under certain circumstances "the Attorney General may, in his own discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence . . ." 8 U. S.C. § 1254(a)(2) deals with suspension of deportation of an alien deportable under 8 U.S.C. § 1251(a)(11), i.e., a narcotics offender. Perhaps more importantly, the internal operating instructions of the Immigration and Naturalization Service expand upon section 1254's coverage of those aliens who qualify for suspension of deportation. Operations Instruction 103.1(a)(1)(ii), promulgated pursuant to 8 C.F.R. § 103.1, states in applicable part:

> In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for non-priority./9

/9 'Nonpriority status' is, in effect, suspension of deportation. Upon review and concurrence of the district director's recommendation by the regional commissioner and a review board, deportation of the alien is suspended.

Although not relevant to this motion, the court notes that petitioner, who has lived in the United States for 25 years and whose wife and six children are American citizens, would appear able to present a persuasive argument for nonpriority status.

The court finds that deportation of an alien is a collateral rather than direct consequence of a guilty plea. As such, petitioner's failure to have been informed of the possibility of deportation does not vitiate the voluntariness of the plea under the provisions of Rule 11.

II. SPECIAL PAROLE

21 U.S.C. § 841(b)(1)(A) states in pertinent part:

> Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment . . . .

Petitioner claims that although the court inquired of his knowledge of the existence of a special parole term, no explanation of the meaning of special parole was given. This issue presents a two-fold question: (1) whether the special parole term is a consequence of the plea; and (2) if so, whether the petitioner was aware of this consequence.

Ineligibility for parole has been held to be a 'consequence' of a guilty plea and thus a matter of which the court must inform the defendant prior to accepting a plea. Bye v. United States, 435 F.2d 177 (2 Cir. 1970); see also Moody v. United States, 469 F.2d 705 (8 Cir. 1972) and cases cited therein. Petitioner here contends that special parole is similarly a consequence of a guilty plea.

The rationale behind Bye and Moody is as follows: the nature of parole is so well understood that its availability may be regarded as assumed by the average defendant, Durant v. United States, 410 F.2d 689 (1 Cir. 1969); thus in a situation where a defendant will not be eligible for parole and is unaware of his ineligibility, he does not plead with an understanding of the consequences of the plea. Petitioner cites United States v. Richardson, 483 F.2d 516 (8 Cir. 1973), where the court relied upon the same reasoning to conclude that special parole under 21 U.S.C. § 841(b)(1)(A) is also a consequence of the plea. As ineligibility for parole is unusual and goes against the common knowledge about parole, so too is a type of parole which adds time to the regular sentence.[10]

Whether the justification is an extension of the reasoning set forth in Bye or simply that the defendant

---

[10] The special parole term is separate from and begins after the regular sentence has been served, including any other parole. In case of a violation of the conditions of the special parole term, the original term of imprisonment will be increased by the entire period of the term, without regard to the length of time spent on special parole. 21 U.S.C. § 841(c). It thus differs in major respects from regular parole, the nature of which is assumed to be understood by the average defendant. Durant v. United States, 410 F.2d 689, 692 (1st Cir. 1969).

483 F.2d at 518 n.5.

"should at least be aware of the length of possible incarceration . . .", Aiken v. United States, 358 F. Supp. 87, 89 (S.D.N.Y. 1972), a special parole term is best considered a consequence of the plea. An examination of the record indicates, however, that the petitioner was made aware of this consequence of his plea. The court informed the petitioner both of the maximum sentence (Tr. 19) and of the mandatory imposition of a special parole term of not less than three years (Tr. 20). Furthermore, the defendant was asked whether he understood that the court would impose a special parole term, and the defendant responded affirmatively (Tr. 20). Finally, the court described the special parole term as being imposed in addition to the regular sentence (Tr. 20).

Petitioner again relies upon Richardson, supra, in contending that an explanation of the meaning of a special parole term was necessary but was not given. Richardson, however, is distinguishable on its facts. There the defendant had only been informed of the special parole term by the Government's reading to the court of the possible maximum sentence. Also, the court never inquired of the defendant as to whether he understood the special parole term. As the court there stated:

> Had the record shown that Richardson had been adequately advised of the consequences of his plea by a reliable source and that he understood these consequences either before entering his plea or in open court, we would find the necessary substantial compliance with Rule 11.

483 F.2d at 519.

The record here indicates that Michel was advised of the special parole term by the court. The court indicated that the special parole term was to be imposed in addition to the regular sentence. The court thereupon specifically inquired if the defendant understood these consequences, and Michel responded that he did understand. In fact, as the Government points out in its memorandum of law, petitioner had earlier in the proceedings displayed a willingness to request clarification of things he did not at the time know or understand (Tr. 19).

The court finds that the petitioner was adequately informed as to the special parole term and that petitioner's plea was entered voluntarily and in accordance with Rule 11, with an understanding of the nature of the charge and consequences of the plea.

The motion is denied and it is

SO ORDERED.

The Clerk of the Court is directed to enter judgment in favor of respondent and against petitioner denying the petition.

The Clerk is further directed to forward a copy of this memorandum of decision and order to the petitioner.

Jacob Mishler
U. S. D. J.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

00014

----------x

UNITED STATES OF AMERICA, :

against- :

AMERICO MICHEL, ROGER MININNI, :
DOMINGO RIVER, a/k/a Flaco, :
and MONTELADA MARCANO, :

Defendants. :

----------x

72-CR-278

United States Courthouse
Brooklyn, New York

February 20, 1973

B e f o r e :

HONORABLE JACOB MISHLER, CHIEF U.S.D.J.

MICHAEL PICOZZI
OFFICIAL COURT REPORTER

Appearances:

ROBERT A. MORSE, ESQ.
United States Attorney for the
Eastern District of New York

BY: DAVID DePETRIS, ESQ.
Assistant United States Attorney

IRVING SINGER, ESQ.
Attorney for Defendant Michel

MARK A. LANDSMAN, ESQ.
Attorney for Defendant Mininni

IRA LONDON, ESQ.
Attorney for Defendant River

MARION SELTZER, ESQ.
Attorney for Defendant Marcano

- - -

THE COURT: Are we ready to proceed, gentlemen?

MR. SINGER: We had a conference with the Assistant United States Attorney. I understand there is going to be a disposition of this matter subject to your Honor's approval.

THE COURT: How is it going to be disposed of?

MR. SINGER: With respect to the defendant Americo Michel, he is offering to plead guilty to the Second Count of the indictment to cover all counts of the indictment in full satisfaction thereof.

THE COURT: We don't consider a plea in that form. I will consider an application to withdraw a plea of not guilty to Count Two and consider a plea of guilty to Count Two with the understanding that at the time of sentencing the Government will move to dismiss the remaining counts of the indictment. That is the form we use here.

MR. SINGER: Thank you. I appreciate that. That is my application.

MR. LANDSMAN: Your Honor, with respect

to the defendant Mininni, Mr. Mininni offers to withdraw his plea of not guilty as far as Count Four is concerned and offers to enter a plea of guilty to Count Four with the understanding, your Honor, that the Government will move to dismiss the other counts of this indictment at the time of sentencing.

THE COURT: All right. Is there anyone else that is making an application?

MS. SELTZER: My understanding with regard to Mrs. Marcano is that a superseding information will be filed alleging possession of cocaine, a misdemeanor, on February 2, 1972.

In Count No. 2, as to her participation, will be dismissed.

THE COURT: How long will it take to draw the information?

MR. DePETRIS: About 20 minutes, your Honor.

THE COURT: All right. And the defendant River?

MR. LONDON: The defendant River is prepared to plead guilty to Count Four.

THE COURT: I intend calling the jury in

and just telling them there is going to be a further recess for about a half hour. I will not dismiss the jury at this time.

Will you please seat the jury.

(The jury entered the jury box.)

THE COURT: We have been delayed discussing certain matters of law that do not concern you at this point. And it will probably take another half hour so you are excused for about a half hour and I will call you back into the courtroom at about that time.

The jury is excused.

(The jury left the courtroom.)

(A recess was taken at this time.)

THE COURT: All right, I will take the application of all the defendants. I want the defendants here. I want the lawyers, the defendants and the interpreters to come to the bench.

Now, I want the interpreters to translate everything I am saying. I am saying this to the group. There is no need to repeat all the rights and consequences of acceptance of a plea four times.

First, Mr. Michel. That is your client?

MR. SINGER: Yes, sir.

THE COURT: And Mr. Mininni is Mr. Landsman's client?

MR. LANDSMAN: Yes.

THE COURT: And Mr. River is Mr. London's client?

MR. LONDON: Yes.

THE COURT: And Mrs. Marcano is Ms Seltzer's client?

MS. SELTZER: Yes.

THE COURT: Now, Mr. Michel, your lawyer indicated that you wish to withdraw your plea of not guilty to Count Two and plead guilty to Count Two, is that correct?

THE DEFENDANT MICHEL: Yes.

THE COURT: And Mr. Mininni, your lawyer indicated that you wish to withdraw your plea of not guilty to Count Four and plead guilty to Count Four, is that right?

THE DEFENDANT MININNI: Yes, your Honor.

THE COURT: And Mr. River, your lawyer said you wish to withdraw your plea of not guilty to Count Four and plead guilty to Count

Four, is that correct?

THE DEFENDANT RIVER: Yes, sir. (Through Interpreter.)

THE COURT: And Mrs. Marcano, your lawyer indicated you were ready to plead guilty to a superseding information and I have a copy of it.

Do you have a copy of it, Ms. Seltzer?

MS. SELTZER: Yes, your Honor.

THE COURT: Before I consider the pleas of the defendants to the count indicated, I must advise you of your constitutional rights and the nature of the charges against each of you and the consequence of your plea of guilty.

Do you all understand the purpose of this inquiry?

Mr. Michel, do you understand?

THE DEFENDANT MICHEL: Yes.

THE COURT: Mr. Mininni, do you understand the purpose of this inquiry?

THE DEFENDANT MININNI: Yes, sir.

THE COURT: Mr. River?

THE DEFENDANT RIVER: Yes, sir.

THE COURT: And Mrs. Marcano, do you under-

stand the purpose of this questioning?

THE DEFENDANT MARCANO: Yes.

THE COURT: I would like to make certain you understand the questions. If you don't, say you don't understand them. Do each of you understand that if you went to trial, you, Mr. Michel, on Count Two; you, Mr. Mininni, on Count Four; you, Mr. River on Count Four; and you, Mrs. Marcano, on the information, that you would be entitled to a public and speedy trial, the continuance of the trial we are conducting now, with the assistance of counsel and that it would be a public trial; do you all understand that?

Do you, Mr. Michel?

THE DEFENDANT MICHEL: Yes.

THE COURT: Mr. Mininni?

THE DEFENDANT MININNI: Yes.

THE COURT: Mr. River?

THE DEFENDANT RIVER: Yes.

THE COURT: Mrs. Marcano?

THE DEFENDANT MARCANO: Yes.

THE COURT: You must answer vocally.

THE DEFENDANT MARCANO: Si.

THE COURT: What?

THE DEFENDANT RIVER: Yes.

THE COURT: You must say it.

Now, you've seen the first witness by the Government and your lawyers have the right to cross-examine the witness that the Government brought. Lawyers have the right to cross-examine the Government's witnesses. That we call a constitutional right, to be confronted by witnesses against you.

Do you all understand that?

Do you, Mr. Michel?

THE DEFENDANT MICHEL: Yes.

THE COURT: Mr. Mininni?

THE DEFENDANT MININNI: Yes.

THE COURT: Mr. River?

THE DEFENDANT RIVER: Yes.

THE COURT: Mrs. Marcano?

THE DEFENDANT MARCANO: Yes.

THE COURT: You have a constitutional right to compulsory process, that means you can have subpoenas issued to bring in witnesses to testify in your behalf.

Do you understand that, Mr. Michel?

THE DEFENDANT MICHEL: Yes.

THE COURT: Mr. Mininni?

THE DEFENDANT MININNI: Yes.

THE COURT: Mr. River?

THE DEFENDANT RIVER: Yes.

THE COURT: Mrs. Marcano?

THE DEFENDANT MARCANO: Yes.

THE COURT: If the plea of guilty is accepted to the counts that you offered to plead to, and you, Mrs. Marcano to the information, then there will be no trial on those charges, so you in effect will be waiving those constitutional rights.

Do you understand that, Mr. Michel?

THE DEFENDANT MICHEL: Yes.

THE COURT: Mr. Mininni?

THE DEFENDANT MININNI: Yes.

THE COURT: Mr. River?

THE DEFENDANT RIVER: Yes.

THE COURT: Mrs. Marcano?

THE DEFENDANT MARCANO: Yes.

THE COURT: First, the charge against Mr. Michel to which he offers to plead guilty is, Count Two charges that on or about the 10th day

of January, 1972, within the Eastern District of New York, the defendant Americo Michel -- and I will eliminate Domingo River so that we don't understand it is an admission made by him that also involves the others -- knowingly and intentionally did distribute approximately 121.4 grams of cocaine, a Schedule 2 narcotic drug controlled substance in violation of Title 21, United States Code, Section 841A1.

Now, Mr. Michel, do you understand the nature of the charge against you?

THE DEFENDANT MICHEL: Yes.

THE COURT: It is in effect you knowingly and wilfully and intentionally distributed, sold, in this case, approximately 121.4 grams of cocaine on the 10th day of January, 1972.

MR. SINGER: He wants to tell you his participation was introducing the co-defendant to the undercover agent and knowing the purpose for which the conference was arranged.

THE COURT: Then you are charged with aiding and abetting the actual sale. And that is the same as being the seller under what we call Section 2 of Title 18.

THE DEFENDANT MICHEL: Yes.

THE COURT: And the charges that you knew you were doing it, you were aware of it and that what you did you did intentionally to promote the sale, do you understand that?

THE DEFENDANT MICHEL: Yes.

THE COURT: I want the defendants themselves to answer. If it is not true, say so.

Will you tell me how you participated?

THE DEFENDANT MICHEL: I was in my house. Then, under cover went to my house with a friend of mine. I know him because he have a jewelry store near to the place I work. Go to the house and tell me the jewelry man go first and tell me, I know if Mr. Mininni have anything. I said I don't know. I check it out.

I take over here and there on and do the thing. He told the thing. I tell the undercover agent I don't want any money on this thing. I know the purpose was I take it there.

THE COURT: You brought the undercover agent to the one who made the sale to the undercover agent?

THE DEFENDANT MICHEL: Yes. But I explain

to the undercover agent I want no money and I want no part of it. I know I am guilty.

THE COURT: When you took the undercover agent over, did you know it was for the purpose of sale of cocaine?

THE DEFENDANT MICHEL: Yes.

THE COURT: That's what I want to know.

Count Four charges the defendant Mininni, and the defendant River, as follows: Do you want to give the interpreter a copy of the indictment so that he can go along with me as I read it? It charges on or about the second day of February, 1972, within the Eastern District of New York, the defendant Roger Mininni and Domingo River, also known as Flaco, knowingly and intentionally did distribute 263.90 grams of cocaine, a schedule narcotic control substance in violation of Title 21, United States Code 841A1.

Mr. Mininni and Mr. River, do you know this count charges you with knowingly and intentionally distributing, and the distribution here was the sale of 263.90 grams of cocaine, on February 2, 1972?

Mr. Mininni, do you understand?

THE DEFENDANT MININNI: Yes.

THE COURT: Mr. River, do you understand?

THE DEFENDANT RIVER: Yes.

THE COURT: The charge is that you were aware of what you were doing and that you were doing it intentionally, voluntarily, knowing it was a violation of law.

Do you understand, Mr. Mininni?

THE DEFENDANT MININNI: Yes.

THE COURT: Do you understand that, Mr. River?

THE DEFENDANT RIVER: Yes.

THE COURT: Doyou know what you are charged with doing, Mr. Mininni?

THE DEFENDANT MININNI: Yes.

THE COURT: Do you know what you are charged with doing, Mr. River?

THE DEFENDANT RIVER: Yes, sir.

THE COURT: Will you tell me what your participation was, Mr. Mininni?

THE DEFENDANT MININNI: Well, I went upstairs and brought the package and I put it in the agent's car.

THE COURT: You knew it was cocaine?

THE DEFENDANT MININNI: Yes, sir.

THE COURT: You, Mr. Flaco -- I mean Mr. River, will you tell me what your participation was?

THE DEFENDANT RIVER: When the man went to see me about buying, I was the one that gave it to him because he went to my apartment.

THE COURT: Did you know it was cocaine that was being sold?

THE DEFENDANT RIVER: Yes, sir.

THE COURT: Mrs. Marcano, will you give the interpreter a copy of the information. The information charges as follows:

First of all, this is a misdemeanor charge so it is not subject to a Grand Jury indictment. The United States Attorney charges that on or about the second day of February, 1972, within the Eastern District of New York, the defendant Montelada Marcano did knowingly and intentionally possess a quantity of cocaine, a Schedule 2 drug controlled substance, possession of which was not pursuant to a valid prescription or order and said possession was not

authorized by any subchapter of the Narcotics Control Act of 1970.

Do you understand, Mrs. Marcano, that the information charges you with having in your possession cocaine?

THE DEFENDANT MARCANO: Yes.

THE COURT: Did you have cocaine in your possession?

THE DEFENDANT MARCANO: Yes.

THE COURT: Did you know it was cocaine?

THE DEFENDANT MARCANO: Yes.

THE COURT: All right. Now, as to each one of you, and listen very carefully, aside from the promise that was indicated to dismiss the other counts in the indictment, aside from the promise to you, Mrs. Marcano, that was indicated that all the counts -- you were only charged with one count, that the count in the indictment be dismissed against you, have any other promises of any kind been made by your lawyer, the United States Attorney, the Court, or anyone else to induce the plea of guilty to the counts to which you offer to plea?

Mr. Michel?

MR. SINGER: The Judge wants to know has anybody made any promises to you.

THE DEFENDANT MICHEL: No.

THE COURT: Mr. Mininni?

THE DEFENDANT MININNI: No.

THE COURT: Mr. River?

THE DEFENDANT RIVER: No.

THE COURT: Mrs. Marcano?

THE DEFENDANT MARCANO: No.

THE COURT: Has your lawyer indicated in any way or expressed any opinion or made any prediction as to what sentence will be imposed?

Mr. Michel?

THE DEFENDANT MICHEL: No.

THE COURT: Mr. Mininni?

THE DEFENDANT MININNI: No, sir.

THE COURT: Mr. River?

THE DEFENDANT RIVER: No, sir.

THE COURT: Mrs. Marcano?

THE DEFENDANT MARCANO: No, sir.

THE COURT: Have you been threatened or coerced in any way, Mr. Michel?

THE DEFENDANT MICHEL: No.

THE COURT: Mr. River?

THE DEFENDANT RIVER: No.

THE COURT: Mr. Mininni?

THE DEFENDANT MININNI: No.

THE COURT: Mrs. Marcano?

THE DEFENDANT MARCANO: No.

THE COURT: Are you pleading guilty to the various counts to which you offer a plea because you are guilty and for no other reason?

Mr. Michel?

THE DEFENDANT MICHEL: Yes.

THE COURT: Mr. Mininni?

THE DEFENDANT MININNI: Yes.

THE COURT: Mr. River?

THE DEFENDANT RIVER: Yes.

THE COURT: Mrs. Marcano?

THE DEFENDANT MARCANO: Yes.

THE COURT: Have you discussed your plea of guilty fully with your respective attorneys?

Mr. Michel?

THE DEFENDANTMICHEL: Yes, with Mr. Singer.

THE COURT: Mr. Mininni, with Mr. Landsman?

THE DEFENDANT MININNI: Yes.

THE COURT: Mr. River, with Mr. London?

THE DEFENDANT RIVER: Yes.

THE COURT: And Mrs. Marcano with Ms. Seltzer?

THE DEFENDANT MARCANO: Yes.

THE COURT: Do you know that the maximum sentence which may be imposed, Mr. Michel, is a prison term of 15 years and a fine of $25,000, do you know that?

THE DEFENDANT MICHEL: No.

THE COURT: Didn't Mr. Singer tell you that? You know that there was a sentence, a statutory sentence that could be imposed, didn't you?

MR. SINGER: Do you know you can be sentenced to jail for this charge?

He didn't know the 15-year limitation.

THE COURT: I think that is most important. I will give you an opportunity to think it over before I pass on the plea.

Do you want more time to think it over?

THE DEFENDANT MICHEL: I have to discuss it with my lawyer.

THE COURT: Mr. Singer, did you --

MR. SINGER: We spoke of the possibility of jail.

THE COURT: You didn't tell him the term? The maximum sentence which may be imposed is a prison term of 15 years and a fine of $25,000.

Do you know that that is the maximum sentence that may be imposed, Mr. Mininni?

THE DEFENDANT MININNI: Yes.

THE COURT: A prison term of 15 years and a fine of $25,000.

Mr. River, do you know the maximum sentence may be a prison term of 15 years and a fine of $25,000?

THE DEFENDANT RIVER: Yes.

THE COURT: You do know that?

MR. DePETRIS: In addition to the special parole.

THE COURT: In addition, the Court must impose a minimum special parole term not less than three years.

Do you understand that?

THE DEFENDANT MICHEL: Yes.

THE COURT: Mr. Mininni?

THE DEFENDANT MININNI: Yes.

THE COURT: Mr. River?

THE DEFENDANT RIVER: Yes.

THE COURT: Mrs. Marcano, do you know that the maximum prison term which may be imposed is a prison term of one year and a fine of $5,000? Do you know that?

THE DEFENDANT MARCANO: Yes.

THE COURT: Mr. Michel, have you thought it over since you are the only one that said you didn't know what the maximum term is?

THE DEFENDANT MICHEL: Now I understand.

THE COURT: Will it in any way affect your offer to plead guilty?

THE DEFENDANT MICHEL: I plead guilty.

THE COURT: You mean it will not affect your offer to plea? You still want the Court to accept your plea of guilty?

THE DEFENDANT MICHEL: Yes, sir.

THE COURT: Having been advised of your constitutional rights, the nature of the charge against you, and the consequence of your plea, Americo Michel, how do you plead to Count Two of the indictment?

THE DEFENDANT MICHEL: I didn't hear.

MR. SINGER: Do you plead guilty or not guilty?

THE DEFENDANT MICHEL: I plead guilty.

THE COURT: Roger Mininni, how do you plead to Count Four of the indictment?

THE DEFENDANT MININNI: Guilty, your Honor.

THE COURT: Domingo River, how do you plead to Count Four of the indictment?

THE DEFENDANT RIVER: Guilty.

THE COURT: Montelada Marcano, how do you plead to the information?

THE DEFENDANT MARCANO: Guilty.

THE COURT: As to the offer of the plea of guilty of Americo Michel, the Court finds there is a factual basis for the plea and accepts the plea.

As to Roger Mininni, the offer of a plea of guilty to Count Four of the indictment, the Court finds a factual basis for the plea and accepts the plea of guilty.

As to the defendant Domingo River, the Court finds there is a factual basis for the

plea of guilty to Count Four and accepts the plea of guilty.

Montelada Marcano, the Court finds there is a factual basis for the plea to the crime charged in the information and accepts the plea of guilty to the information.

Now, I am ready to declare a mistrial in the case on trial and I assume the defendants so move. I want to make sure there is no question of double jeopardy here.

MR. SINGER: The defendant Michel moves.

MR. LANDSMAN: The defendant Mininni moves.

MS. SELTZER: I so move.

MR. LONDON: I so move.

THE COURT: Seat the jury.

(The jury entered the jury box.)

THE COURT: Ladies and gentlemen, the defendants Michel, Mininni and River have pleaded guilty. Each pled guilty to one count in the indictment. And the defendant Montelada Marcano pleaded guilty to a misdemeanor, what we call a superseding information.

Therefore, I declare a mistrial in this

case. There is no reason to go on. When I have 14 citizens come in, 12 of whom have never served on a jury before, you probably feel that you came in and sat and did nothing. There are times when defendants must come face to face with the Government's evidence. And in this case, after talking with their lawyers and understanding what the Government's evidence is, they decided to plead guilty.

You served a very valuable function in this case. You are discharged at this time. Will you please return to the central jury room downstairs on the first floor for further instructions.

(The jury was discharged.)

THE COURT: Do we have a problem on bail?

MR. DePETRIS: The Government has no objection to continuing.

THE COURT: Defendants continued with the terms and conditions previously fixed. I assume that the lawyers will see to it that the defendants go down to the Probation Department immediately and answer any questions that Probation wants as to background.

Do we have a probation officer here, Mr. Adler?

THE CLERK: I'm sorry --

THE COURT: Would you like to call them or would you like to take the defendants down.

MR. LANDSMAN: I will be happy to do that.

THE COURT: Go directly there. Bail is continued on condition that you go directly to the Probation Department.

Thank you.

- - -

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA :

-against- :

AMERICO MICHEL : 72 CR 278

----------x

United States Courthouse
Brooklyn, New York
June 1, 1973
10:00 a.m.

B e f o r e:

JACOB MISHLER, Chief U.S.D.J.

HENRI LeGENDRE

ACTING OFFICIAL COURT REPORTER

APPEARANCES:

ROBERT A. MORSE, ESQ.,
United States Attorney for the
Eastern District of New York

BY: D. DePetris, Esq.,
Assistant United States Attorney

IRVING SINGER, ESQ.,
For the Defendant.

* * * * *

THE CLERK: For sentence, U.S.A. versus Americo Michel.

MR. SINGER: If you recall, your Honor, last time we were here for sentence, your Honor called to my attention a disparity in the Probation Department's report which in effect the defendant while admitting his guilt does not admit the participation to the extent that the Probation Department believed he was involved, or the participation that the government agents believe he was involved, and your Honor afforded me an opportunity to look at the probation report, and I signed the receipt. I have a copy of it. I've gone over point by point with him, and your Honor asked that I report back this morning as to what his attitude is, and I assume make full and fair disclosure, and I've had a long conversation with him and have gone through the complete details, both of the report and of the consequences of his actions, and I've also explained to him since he admits he's guilty, not to the extent that is involved in the probation report. He would like to explain to your Honor personally

his involvement, and I've gone through the report carefully, and while it consumes his involvement, two days which are mentioned on pages three and four are the dates where his involvement is involved, -- it's not the extent that he was involved. He received no compensation. He was not part and parcel of a large transaction. This is corroborated by the fact that he lives home, as your honor report indicates, and I notice the fact that he has financial difficulty. He works as a salesman, his wife is receiving welfare and the report indicates that they are not entitled to welfare. They are living under modest circumstances, from what I've seen or know from the report, or what I've seen from him or his background. He couldn't have been involved in the kind of money that is indicated in those reports, but he would like to tell you what his participation is rather than myself.

MR. MICHEL: In the beginning I don't want to play innocent. I want to pay for the crime I commit. The crime I commit, they put too many things in, I had nothing to do with it.

In the beginning I explain how I got involved in this thing. I was out with my family, and first this man, the informant, go to my house and he leave the other guy to my house. The informant was very good friends with me in the beginning. He know the business because I have a clothing store, and he have a jewelry store, and I was very good friends with that guy, the informer, and I was friends with him in the beginning. I live one block from him -- I move from that place, from 137 East 28th Street.

One night I was in my house with my family, and the informant come to my house and knock on the door and tell me, can I talk to you. He said, "I want you to take this man," because he had some business to discuss, and then he said, "Why don't you take him, yourself?" I said, "Because I don't have no car."

After that discussion for a little while I take the man over there. When I take the man over there, they say they go to Flacko. They got that thing over there. They sold one ounce of cocaine. I don't want to have nothing to do with that thing. I don't want no part in that

thing but I was involved in it. I was in the presence. I no take no money. The government know I take no money. The next time he called my house, he tell me I want to buy coke. I said, don't talk that way on the phone; I have my family, I hang up. He call me about three times on the phone. I go over there, they say, "Take me to Flacko." I say, "Why don't he take you?" He say "No, he's in the bar."

He said -- after he persuade me, I say, "Listen, I don't want to bother with that damn thing. " I take him over there. He persuade me when I take him over there. I say "Listen, don't bother me any more. I don't want to bother with anything. Don't call me at my house. I want nothing to do with that."

Three months later that was the end. I never see the undercover, I never see Molina, I never see Flacko. Three months later he come to my house -- this is really true, and they know I don't take no money, because I tell the government I don't want no part in that thing. Don't call me at my house no more. I don't want no part in that coke business. I pay for the

crime I commit, but I have my own family, I have one son in the Army, one in the Marines. My wife is pregnant. And all these charges-- this man charge me all the things, I drive myself crazy, my wife, everything. I have no money to pay my house. I got the paper here, they want to take my house. You think I dealing in drugs? I don't have money to pay my house. You think I deal in coke? I can't pay that thing. I have no money to pay my bills.

THE COURT: I don't think you have a lot of money. Mostly poor people commit crimes, not rich people.

MR. MICHEL: I commit the crime to take the men there.

THE COURT: Did you know why?

MR. MICHEL: In the beginning, I don't know. In the end, I know. I was involved in it. The second time I know, but what can I do?

MR. SINGER: What his position is he knew the second time. He big-time operator.

MR. DePETRIS: I have to point out one statement.

MR. MICHEL: I say I don't want part in

nothing. What can I do, I was involved already and they say on the telephone -- and after that I never see the man again.

Why did you think they were taking you to Molina?

MR. MICHEL: He drive me to Flacko -- I don't know. I thought after that.

MR. SINGER: He thought he became involved at that stage; that's why he made the subsequent appointment, and he made the phone call.

THE COURT: This statement says although the defendant admits accompanying Molina -- Why did you think you were going to Rivera's home?

MR. MICHEL: I don't know, because the jury -- the man with the jury store I figure is going to be there to sell jury, or something like that.

THE COURT: Tell me what the purpose of all this is?

MR.SINGER: Your Honor didn't feel that he was honest with the Probation Department.

THE COURT: I thought he was saying he's

not guilty.

MR. MICHEL: I want a trial.

MR.SINGER: He said on the two occasions he didn't know the perpetrator. The second occasion, he did bring the informant. With that particular story, it would be a mere inquest. His purpose is, he's guilty of what he explained, he wants that to stand but he wants to be punished for what he actually did, not allegedly, as the probation report indicates being a big-time operator profiting from narcotics.

THE COURT: Did you hear what your lawyer said? Do you understand that you are guilty of the crime charged?

MR. MICHEL: I'm guilty because I bring the man over there, without any knowledge they are going to sell --

THE COURT: He's saying not guilty.

MR. MICHEL: The second time I know. The second time when they call my phone, they tell me on the telephone, I want to buy cocaine. I said I got the kids in the house. He call me three times. I go -- I say I meet you in the place you work. I go there and I say, why you

call me,why you bother me? I don't want to know anything. He persuade me, let's go over, do me a favor, take this over here, loan me your car, take me to Flacko.

THE COURT: Did you know why you were taking him to that address?

MR. MICHEL: The second time, yes.

THE COURT: Did you get money?

MR. MICHEL: No, the agent know I not take any money.

MR. SINGER: I think that in substance is the basis of the plea.

MR. DePETRIS: I would like to point out the factual discussion during the course of the second transaction. The defendant --

MR. MICHEL: I swear to God, I swear to my kids, I never say that thing.

THE COURT: There is one thing I want to say. Are you interested in withdrawing your plea and going to trial? Do you want to withdraw your plea of guilty and go to trial in this case?

MR.MICHEL: The way I explain to you, I am guilty because I bring the man over there.

I never tel. these men --

MR.SINGER: He wants your Honor to hear what his explanation is, as to the background.

THE CO[illegible]T: Is that clear in your mind?

MR. SINGER: It's clear to me.

THE COURT: I want to make sure it's clear in his mind. Do you want to withdraw the plea and go to trial?

MR. SINGER: The Judge wants to know, do you want to plead guilty to the one time or do you want to go to trial?

MR. MICHEL: I want to plead.

MR. SINGER: He wants his plea to stand.

THE COURT: You are sure?

Americo Michel, do you have anything to say before the Court imposes sentence upon you?

MR. SINGER: May I just point out, as your Honor knows and I've said it so many times, his wife is pregnant, seated in the back of the Court. They have seven children, two of them in the armed services, one in the Marines, one in the Army, five infant children at home.

MR. MICHEL: I"m the only man working.

MR.SINGER: I think he added it all; what

else can I add?

MR. MICHEL: I don't know.

MR.SINGER: I ask your Honor to be as lenient as possible.

THE COURT: Do you have anything to say about the sentence?

MR. SINGER: Anything you want to add?

MR. MICHEL: The only thing I can add, your Honor, you see I'm the only man in my house, anything happens to me, -- what's going to happen to my wife and kids without me? I'm the only one working. I no bother with that thing any more -- oh, my God, I take this man over there.

MR. SINGER: I'm certain if your Honor were lenient in this case, he would never be involved in anything again.

MR. MICHEL: Never in my life in Court -- only years ago -- 23 years ago.

MR. SINGER: He's never been convicted. One time involving a car which apparently was dismissed.

THE COURT: Anything else?

MR. SINGER: Nothing else.

THE COURT: Americo Michel, on your plea

of guilty to count two, I sentence you to the custody of the Attorney General of the United States, or his duly authorized representative, who shall choose the place of confinement for a term of five years. In addition thereto, I impose a special parole term of five years.

MR. SINGER: Would your Honor entertain a motion to suspend that sentence?

MR. MICHEL: Can I go to trial?

THE COURT: Now you want to try the case? If you would like to know how the other judges felt about it, one other judge would have given him six years, the other judge agreed with me on five.

MR. SINGER: I was going to ask your Honor about the work program.

THE COURT: No. There's nothing in this record to show that this was not an isolated incident. There is enough in this record to show that this man is in the cocaine business.

MR. MICHEL: Can I talk for one second? Can I say something?

THE COURT: No, you can't. Your only regret is that you were caught; that's all.

There are people here that are addicted to hard drugs.

MR. MICHEL: Your Honor --

THE COURT: I would like to see the mothers of the children in this court who are addicted because of cocaine.

MR. MICHEL: I never sold cocaine in my life.

THE COURT: That's hard to believe.

MR. MICHEL: Your Honor, I tell you the reason I never sold cocaine.

MR. DePETRIS: At this time the government moves to dismiss the only remaining count, count one.

THE COURT:Motion granted.

* * * * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

AMERICO MICHEL, Petitioner	:	
-vs-	:	Civil No. 74-C-627
UNITED STATES OF AMERICA, Respondent	:	

MOTION TO VACATE SENTENCE AND GUILTY PLEA

Petitioner, by counsel, respectfully moves this Court to vacate his sentence pursuant to 28 U.S.C. § 2255 and in support thereof alleges:

1. Petitioner is incarcerated at the Federal Correctional Institution, Danbury, Connecticut.

2. On February 20, 1973, petitioner was convicted upon a plea of guilty of violating 18 U.S.C. § 2 (aiding and abetting) and 21 U.S.C. § 841 (a)(1)(distribution of a controlled substance - cocaine). On June 1, 1973, Hon. Jacob Mishler sentenced petitioner to imprisonment for five years with a special parole term of 5 years.

3. Petitioner is a citizen of the Dominican Republic, living in the United States as a permanent resident since 1949.

4. Petitioner's plea was not voluntary in that it was made without true and complete knowledge and understanding of the consequences of the plea.

a. Petitioner did not know he would be mandatorily deported as a result of his conviction, pursuant to 8 U.S.C. § 1251(a)(11) and (b) as an alien convicted of a narcotics offense. Neither at the time his guilty plea was entered nor at the time of sentencing was he so advised of this consequence by counsel, the United States Attorney, or the Court. As a first offender with no experience with the law he had no occasion to have this knowledge.

b. Petitioner did not understand the meaning of the special parole term attached to his sentence pursuant to 28 U.S.C. § 841(b)(1)(A) nor was it explained to him by counsel, the United States Attorney, or the Court at the time the guilty plea was entered or at the time of sentencing. As a first offender with no experience with the law he had no occasion to have this knowledge.

5. Petitioner would not have pled guilty if he had known and understood the full consequences of his plea.

6. Petitioner has not previously submitted a motion to vacate to the Court.

WHEREFORE, petitioner respectfully prays that this court vacate its judgment of conviction and allow defendant to plead anew to the charges.

THE PETITIONER

By _____

Michael J. Churgin
Attorney for Petitioner
127 Wall Street
New Haven, Connecticut 06520
(203) 436-2210

State of Connecticut)
) S.S.: Danbury, April 5 , 1974
County of Fairfield)

AMERICO MICHEL, being duly sworn, deposes and says that deponent is petitioner in the within action; that deponent has read the foregoing motion and knows the contents thereof; that the same is true to deponent's own knowledge.

Americo Michel
Americo Michel

Sworn to and subscribed to before me this 5th day of April, 1974.

R. R. Smithson, Parole Officer
Authorized by the Act of July 7, 1955
to administer oaths (18 U.S.C. 4004)

[signature]

CERTIFICATION

This is to certify that a copy of the foregoing Motion to Vacate Sentence has been served on David DePetris, Esq., Assistant United States Attorney, United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York 11201 by mail, postage prepaid this 2d day of April, 1974.

/s/ Michael J. Crawford

00056

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

AMERICO MICHEL,
Petitioner

-vs-

UNITED STATES OF AMERICA,
Respondent

CIVIL NO. 74-C-627

AFFIDAVIT

State of New York)
) s.s.: Brooklyn, April 17, 1974
County of Kings)

I, Irving Singer, being duly sworn according to law, depose and say:

1. I was the attorney of record for defendant in the case of United States v. Americo Michel, 72 Cr. 278 in the United States District Court for the Eastern District of New York. I was present on February 20, 1973, when the defendant Michel entered a plea of guilty and on June 1, 1973, when the defendant Michel was sentenced before the Honorable Jacob Mishler, Chief Judge.

2. To the best of my knowledge, I did not discuss the question of deportation with Mr. Michel.

3. To the best of my knowledge, I did not discuss the meaning of "special parole" with Mr. Michel. However, plea was entered during trial and was based upon the revelation of the proposed government witness and was the best plea offered. In the opinion of all concerned if the case would have proceeded the defendant would have been convicted of all counts of the indictment wherein he was named.

Irving Singer

IRVING SINGER

Sworn to and subscribed to before me this 17 day of April, 1974.

IRVING L. BLOCK
Notary Public, State of New York
No. 31-[illegible] Qualified in Nassau Co.

BUREAU OF PRISONS WASHINGTON, D. C. 20537 00057

Policy Statement

7500.43

SUBJECT: DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970

1-18-73

---

1. PURPOSE. To implement policy and procedures on the "Drug Abuse Prevention and Control Act of 1970" (P.L. 91-513), as codified under Title 21 U.S.C. 801 through 966.

2. BACKGROUND. On October 27, 1970, Congress passed the "Drug Abuse Prevention and Control Act " to become effective May 1, 1971. This new law gives comprehensive coverage on all drug offenses, and repeals the older narcotic laws. The new law introduces a Special Parole Term for certain offenses (See Attachment No. 1).

3. DIRECTIVE AFFECTED. For those drug violations occurring on or after May 1, 1971, this Policy Statement supercedes Policy Statement 7500.13, dated November 9, 1956 (as amended by U. S. Board of Parole memorandum concerning "certain marijuana offenders", dated December 29, 1966). Page 1 of Policy Statement 7500.43, dated 8-8-72.

4. DISCUSSION. The new law simplifies the handling of drugs (controlled substance) cases by categorizing the offenses. For certain offenses the new law specifies a Special Parole Term (SPT) to be used in addition to and not in lieu of normal sentencing and parole procedures. This is a new concept, and must be considered in conjunction with the sentence procedure used by the court. The applicability of this SPT to the various sentencing procedures is listed below:

a. It is the interpretation of the Bureau of Prisons that a SPT cannot be imposed in conjunction with an FJDA, YCA or NARA sentence. Any judgment and commitment to this effect should be referred to the Office of General Counsel and Review.

b. The SPT should be imposed upon imposition of a "Split Sentence" (18 U. S. C. 3651). However, the SPT will not become effective if the subsequent period of probation is successfully completed. It will become effective only if probation is revoked and imprisonment for the remainder, or any part of the remainder, of the sentence is ordered.

c. The SPT will be in addition to Regular, 18 U.S.C. 4208(a)(1), 18 U.S.C. 4208(a)(2), 18 U.S.C. 924(a) and 26 U.S.C. 5871 sentences. The SPT is separate from and begins after the usual sentence terminates, including any period of supervision. In the event an individual should violate during the period of supervision prior to the beginning of the SPT, he will be returned as a violator of the basic period of supervision with the SPT still to follow unaffected. When an individual is released from confinement by any of the following methods, the SPT will begin as indicated:

(1.) Mandatory Release - SPT begins at the termination of supervision.

(2.) Parole - SPT begins at full term date.

(3.) Sentence Expiration (Exp-GT, Exp-FT and Min-Exp) - SPT begins with release from confinement.

5. PROCEDURES.

a. Sentence Computation of the SPT: When an individual is committed to an institution as a SPT violator the Statutory Good Time (SGT) rate will be determined by adding the original sentence imposed to the SPT for a total number of years. That total will determine the rate. For example, if the original sentence is 2 years and the SPT is 8 years for a total of 10 years, the SGT rate will be 10 days per month for the SPT. The 8 year special parole violator term will be computed from the date the warrant is executed. If the individual is returned as a re-violator of the SPT, the SGT rate will remain the same as previously established. The 10 day SGT rate will not be applicable to the original sentence of 2 years. The 2 year sentence will be computed as normal, i.e., at the 6 day SGT rate per month.

b. Aggregation of sentences with a SPT to follow: When two or more sentences are aggregated and a SPT is to follow one of the sentences, the SPT will begin at the termination of the aggregate, including any period of supervision, the same as described in paragraph 4., c. For example, if the first sentence imposed is for 2 years with a SPT of 8 years to follow and a consecutive sentence of 2 years is imposed for a total of 4 years, then the SPT will begin at the termination of the 4 year sentence, including any period of supervision. If the individual is returned as a SPT violator, the SGT rate will be determined by adding the aggregate sentence of 4 years to the SPT of 8 years for a total of 12 years. The SGT rate in this case would, of course, be 10 days per month. The 10 day SGT rate will not be applicable to the aggregate sentence of 4 years. The 4 year sentence will be computed as normal, i.e., at the 7 day SGT rate per month.

If more than one of the sentences include a SPT, the SPT's should be computed as running concurrently unless the court specifically directs they are to run consecutively. This same rule applies when more than one count includes a SPT.

c. Extra Good Time: Extra Good Time will be applicable to the SPT violator at the usual rates. The SPT violator must begin at the 3 day rate either as a first or subsequent violator and advance to the 5 day rate as usual.

d. Judgment and Commitment: If the court fails to impose a SPT when it obviously applies, the institution must request an amended or corrected judgment or an explanation as to the discrepancy from the court (See Attachment No. 2). Should the institution fail to receive a satisfactory reply, or no reply at all after a reasonable period, the matter should be referred to the Office of General Counsel and Review. If there is any doubt as to the applicability of an SPT the Office of General Counsel and Review must be consulted.

e. SPT Certificates: The SPT certificates will be made up in sets of four and distribution made as normal. There are three types of certificates as follows:

(1.) Certificate of Special Parole (Form I-19):

This certificate will be prepared and executed at the time of release from the basic sentence, in addition to any other certificate, by the releasing institution. The certificate will contain the number of years of the SPT, the date it begins and the date of termination.

(2.) Certificate of Parole to Special Parole (Form H-25):

This certificate will be issued by the U. S. Board of Parole. If an individual is committed to an institution as a SPT violator, the U. S. Board of Parole may parole or re-parole the SPT violator at any time. In these cases, an effective parole date will be established and the institution will be required to request certificates the same as if it were a parole from the original portion of the sentence.

(3.) Certificate of Mandatory Release to Special Parole (Form I-18):

This certificate will be prepared and executed by the releasing institution. If an individual is committed to an institution as a SPT violator and serves to his mandatory release date, this certificate must be used. Title 18 U.S.C. Section 4164 (180 day date) does not apply to the SPT and supervision continues to the full term date.

f. SPT Warrant: The SPT warrant will be blue in color to distinguish it from the white colored warrant issued for an alleged violation of parole and the buff colored warrant which is issued for an alleged violation of mandatory release. The SPT warrant will contain similar data and be in the same style as the other two warrants.

g. Wanted-Flash-Cancellation Notice I-12 (Rev. 3-17-67): The form I-12 will be completed in duplicate. The original will be forwarded to the FBI as usual and the copy will be forwarded to the appropriate U. S. Probation Office along with the appropriate SPT certificate. The policy of listing the U. S. Board of Parole as one of the "Parties to be notified of apprehension" on the I-12 is no longer a requirement and this practice should be terminated immediately.

The current form I-12 does not include a space for expiration of the SPT nor does it include a space for "Sentence Expiration" (Exp-GT, Exp-FT and Min-Exp) when it is necessary to report a SPT period to follow. The FBI has granted us permission to modify the existing form by typewriter to accommodate these situations. The existing form will be modified as follows (See Attachments Nos. 3, 4, 5, 6, and 7):

SENTENCE EXPIRATION _____ 19_____
SPT EXPIRES_____ 19_____

IT IS MANDATORY THAT ALL FIELD INSTALLATIONS MODIFY THE I-12 EXACTLY AS INDICATED ABOVE AND AS SHOWN ON ATTACHMENTS NOS. 3, 4, 5, 6, AND 7.

Following are instructions for completing the modified I-12:

(1.) Mandatory Release from a normal sentence with a SPT to follow:

Enter the date mandatorily released and the date the mandatory release supervision expires in the appropriate spaces as usual. Enter the date the SPT expires in the "SPT EXPIRES" blank (See Attachment No. 3).

(2.) Parole from a normal sentence with a SPT to follow:

Enter the date of release on parole and the date the parole supervision expires in the appropriate spaces as usual. Enter the date the SPT expries in the "SPT EXPIRES" blank (See Attachment No. 4).

(3.) Sentence Expiration with a SPT to follow:

Enter the date of sentence expiration (Exp-GT, Exp-FT and Min-Exp) and the date the SPT expires in the "SPT EXPIRES" blank (See Attachment No. 5). The "Final Disposition Report", R-84 (Rev. 6-29-71) will continue to be used for releases by sentence expiration (Exp-GT, Exp-FT and Min-Exp) when no SPT is attached.

(4.) Mandatory release while serving as a violator of the SPT:

Enter the date mandatorily released in the "MANDATORY RELEASE" blank; N/A (Not Applicable) in the "EXPIRES" blank; and the full term date of the SPT in the "SPT EXPIRES" blank (See Attachment No. 6).

(5.) Parole or re-parole while serving as a violator of the SPT:

Enter the date of release on parole or re-parole in the "PAROLE" blank; N/A (Not Applicable) in the "EXPIRES" blank; and the full term date of SPT in the "SPT EXPIRES" blank (See Attachment No. 7).

(6.) Sentence Expiration while serving as a violator of a SPT:

Title 18 U.S.C. Section 4164 (180 day date) is not applicable to the SPT. It is therefore virtually impossible to have a release from confinement as a SPT violator by sentence expiration as the release date would have to occur on the full term date of the SPT. This situation could possibly occur if the SPT is terminated either by judicial or U. S. Board of Parole determination. In these cases, the R-84 (Rev. 6-29-71) must be used (See Attachment No. 8).

THE FBI NUMBER OR FINGERPRINT CLASSIFICATION MUST BE ENTERED ON BOTH THE I-12 AND R-84 WITHOUT EXCEPTION.

Norman A Carlson

NORMAN A. CARLSON
Director
Bureau of Prisons

00062

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
BURLINGTON, VERMONT 05401

OFFICE OF THE REGIONAL COMMISSIONER

IN REPLY PLEASE REFER TO FILE NO.

September 17, 1974

NE 103.10-P

Jerome N. Frank
Legal Services Organization
Yale Law School
New Haven, Connecticut 06520

Attention: Ms. Anna M. Durbin

Gentlemen:

Re: U.S. v. Americo Michel

This will acknowledge your letter of September 13, 1974 in which you request a copy of our Operation Instruction 103.1(a)(1)(ii).

The following is a verbatim copy of the Operation Instruction desired:

> "(ii) Nonpriority. In every case where the district director determines that adverse action would be unconscionable because of the existence of appealing humanitarian factors, he shall recommend consideration for nonpriority. His recommendation shall be made on Form G-312, which shall be signed personally by him.
>
> If the recommendation is approved the alien shall be notified that no action will be taken by the Service to disturb his immigration status, or that his departure from the United States has been deferred indefinitely, whichever is appropriate."

Sincerely,

Socrates P. Zolotas
Regional Commissioner